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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 864

DON BALDWIN, J. H. BELVIN, ED BERRONG, ROY C. BOECHER, WILFORD E. BOHANNON, ROBERT H. BREEDEN, CHARLES E. COLSTON, RAY FINE, GLEN HAM, LEROY MCCLENDON, LOUIS H. RITZHAUPT, ALFRED STEVENSON, TOM TIPPS, BASIL R. WILSON, ARTHUR G. MCCOMAS, WALT ALLEN, BOYD. COWDEN, BYRON DACUS, CLEM HAMILTON, BOB A. TRENT, JOE BAILEY COBB, LEON B. FIELD, S. S. MCCOLGIN, ALLEN G. NICHOLS, and GENE STIPE, State Senators of the State of Oklahoma,

Appellants,

VERSUS

HARRY R. MOSS; COWBOY PINK WILLIAMS, State Treasurer; A. F. SHAW, State Auditor; J. D. DUNN, LAWTON LEININGER and MIKE CONNORS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWITT, Vice-Chairman, and FRANK RENEAU, Secretary, Members of the State Election Board of the State of Oklahoma; HENRY BELLMON, Governor of the State of Oklahoma; and COUNCIL OF NEIGHBORHOOD DEMOCRATIC CLUBS, an unincorporated association,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT

WALT ALLEN,
Chickasha, Oklahoma,
JIM A. RINEHART,
El Reno, Oklahoma,
LEON S. HIRSH,
JAMES C. HARKIN,
Oklahoma City, Oklahoma,

Attorneys for Appellants.

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PAUL JOHANNING

February, 1963.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-8750

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In the

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No. ____

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Appellants,

VERSUS

HARRY R. MOSS; COWBOY PINK WILLIAMS, State Treasurer; A. F. SHAW, State Auditor; J. D. DUNN, LAWTON LEININGER and MIKE CONNORS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWITT, Vice-Chairman, and FRANK RENEAU, Secretary, Members of the State Election Board of the State of Oklahoma; HENRY BELLMON, Governor of the State of Oklahoma; and COUNCIL OF NEIGHBORHOOD DEMOCRATIC CLUBS, an unincorporated association,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT

a. OPINION OF THE COURT BELOW

The Decree and Memorandum Opinion of the United States District Court for the Western District of Oklahoma, here appealed, have not yet been officially or unofficially reported. The Decree is appended hereto as Appendix I, and the Memorandum Opinion is appended as Appendix II.

b. GROUNDS OF JURISDICTION

(i) Nature of the Proceeding

(1) This is an appeal from an order of a 3-judge Federal Court enjoining the appellants from prosecuting in the Supreme Court of Oklahoma an action to redetermine the law of Oklahoma in relation to the composition of the State Senate of that State.

(2) The injunction herein appealed was ordered as a part of the litigation presently on appeal in Cause No. 688 of this Term. The injunction was decreed subsequent to the entry of the Decrees involved in the aforesaid pending appeal and therefore apparently must be separately appealed rather than incorporated in the latter.

(3) It should be noted also that the appellants here are not identical with the appellants in Cause No. 688. The only appellants in this cause are the State Senators who are co-appellants in the latter cause, others of the appellants in the other appeal not being joined herein.

(4) Following rendition of the Decree involved in Cause No. 688, for the reason that the 3-judge court thereby itself had injected into the litigation the non-Federal issue of the law of Oklahoma, construing the law of Oklahoma to be contrary to that which the Supreme Court of Oklahoma had declared to be its provisions (as more fully explained in the "Statement of the Case," *infra*) the State Senators who are appellants here, together with colleagues to a total of 30 of the 44 membership of the State Senate, applied to the Supreme Court of Oklahoma to take original jurisdiction of a bill *quia timet* to redetermine the pro-

visions of Section 9(a), Article 5, of the Oklahoma Constitution in the particulars wherein the 3-judge court Decree had created a definitive conflict of decision, joining in said bill the collateral Federal question of the validity of the legislative apportionment provisions of the Oklahoma Constitution in relation to the Constitution of the United States, Amendment XIV.

Certain of the appellees, prior to action by the State Supreme Court on that application, moved the 3-Judge Federal Court sitting in the pending litigation to enjoin the prosecution of the State Court proceeding. The 3-judge court issued an order to the appellants to show cause why they should not be enjoined as prayed. A Response to the Motion, with brief in support thereof, was presented by appellants and, after a hearing, the 3-judge court verbally enjoined the State Senators from proceeding further with the matter in the State Supreme Court. Written "Order" (Appendix I) and a "Memorandum of Decision Granting Restraining Order" (Appendix II) were filed later. Notice of appeal was filed immediately, along with a Motion to Stay and Supersede. The latter motion was denied at the time of filing the order and memorandum.

(ii) Dates of Judgment and Appeal

The order of injunction was entered on January 15, 1963. The Notice of Appeal was filed in the trial court on the same date, *i.e.*, January 15, 1963.

(iii) Statutory Jurisdiction of This Court

This appeal is taken pursuant to the provisions of the Act of June 25, 1948, c. 646,[1] the 3-judge court having been constituted under the same Act,[2] and properly so.[3]

(iv) Cases Sustaining Jurisdiction on Appeal

Appellants submit the following cases which are believed to sustain the jurisdiction of this Court on this appeal: *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167; *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496; *Government & Civic Emp. Org. Com. CIO* v. *Windsor*, 353 U.S. 364; *Florida Lime and Avocado Growers, Inc.* v. *Jacobson*, 362 U.S. 73.

(v) State Legislation Involved

The constitutional provision of the State of Oklahoma involved in this appeal is Section 9(a), Article 5, Constitution of Oklahoma,[4] which is set out verbatim in Appendix V.

c. QUESTION PRESENTED BY THE APPEAL

The sole question presented by this appeal is as follows:

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[1] 62 Stat. 928; 28 U.S.C. § 1253.

[2] 62 Stat. 968; 28 U.S.C. § 2281.

[3] *Baker* v. *Carr*, 369 U.S. 186; *Florida Lime and Avocado Growers, Inc.* v. *Jacobson*, 362 U.S. 73.

[4] Volume 1, p. 64, Oklahoma Statutes 1961.

Whether, after itself having injected into the litigation as a determinative issue, in its Decree, the construction of a State law, declaring the State law to differ from the prior declaration in such regard by the highest court of the State, in violation of the Rules of Decision Act, and then having failed to conform to the doctrine of abstention made pertinent by such determination, and itself having created thereby a conflict of decision between the State and the Federal courts on a matter purely of State law, a 3-judge Federal Court abused its discretion in restraining prosecution of litigation instituted in the state courts for the purpose of seeking a redetermination of the State law by the State courts?

d. STATEMENT OF THE FACTS

The general nature of the order herein appealed, and the litigation, prosecution of which was ordered enjoined, have been stated in the "Nature of the Proceeding," *supra*. And the "Memorandum of Decision Granting Restraining Order" (Appendix II hereto) substantially states the antecedents to the making of the order.

However, there are two material points of issue with the statements made in the memorandum. One is the factual statement that "plaintiff and those aligned with him, offered evidence without objection *tending to show that the disparity in the legislative apportionment was invidiously discriminatory; that apportionment on a numerical basis was the starting point to achieve equal protection of the laws* * * *." (Emphasis ours.)

Those particular statements are the subject matter and issues in the appeal in Cause No. 688, this Term, it being the contentions of appellants that there was no evidence that, in law, properly could be construed to tend to establish *invidiousness* of any discrimination that *might* exist, or that, as a matter of law, the Constitution of the United States requires legislative apportionment on a numerical basis in order to achieve equal protection of the laws.

Without seeking to present here the issues of the appeal in Cause No. 688, it still should be remarked that it was the burden of the "plaintiff and those aligned with him" *to prove* invidiousness, not the burden of appellants to controvert non-existing evidence in that regard, and that the appellants *did* statistically prove, the Memorandum notwithstanding, without any evidence to the contrary by appellees, that *Census* enumeration (the only enumeration contained in appellees' evidence) provided no measure of individual political responsibility or power by which equal protection of the laws rationally could be measured.

Another major ground of respectful disagreement with the statements of the Memorandum is its choronological incorrectness in stating that *any* hearing was held on September 10, 1962, for any purpose relating to the issues. Appellants respectfully submit that the record in Cause No. 688[5] will demonstrate that the *last hearing* at which any evidence was taken was at the hearing commencing on July 31, and that the *final decree* was rendered on *August 3rd.*[6]

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[5] See: *National Fire Ins. Co.* v. *Thompson*, 281 U.S. 331.

[6] Appendices III and IV, *infra*.

However, the incorrectness of that, and other statements, made in the Memorandum are not as pertinent to the instant appeal as the matters which it *fails* to state.

When the appellants intervened in the litigation in the District Court, they *did* challenge the validity of the Oklahoma constitutional legislative apportionment formulae, asserting that any apportionment based upon Census population would be invidiously discriminatory as an wholly irrational measure of political responsibility and power. This was solely a Federal question.

At that time, and throughout the litigation—*up until the entry of the 3-judge court Decree of August 3rd* (Appendix III)—there was no issue as to what the Oklahoma Constitution *provided* as to membership of the State Senate.

The law of Oklahoma—eliminating any question of contravention of the Constitution of the United States—had been clearly announced in the decision of the Oklahoma Supreme Court, nearly 20 years ago in 1944, in the case of *Jones* v. *Freeman*,[7] had been reasserted in 1946 in the decision in *Grim* v. *Cordell*,[8] and again as late as February, 1962, in the decision in *Reed* v. *State Election Board*.[9]

According to those decisions, the law of Oklahoma provided that, in light of the 1960 Federal Census (which is the measure for apportionment of the State Senate under Section 9(a), Article 5, Oklahoma Constitution, *supra*, the State Senate *must* be composed of *more than* 44 Senators.

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[7] 193 Okla. 554, 564, 146 P.2d 564.

[8] 197 Okla. 144, 145, 169 P.2d 567.

[9] 369 P.2d 156, 159.

But, by the Decree of August 3rd, the 3-judge court declared, in the grammatical imperative mood, that "The Senate of the State of Oklahoma *will be* reapportioned" in a manner that it shall be composed of *only* 44 Senators, assigning 17 to three counties only and leaving the rest to be apportioned to the rest of the State. And it further emphasized the mandatory nature of this order by declaring that if the Oklahoma Legislature did not enact legislation so providing by March 8, 1963, the 3-judge court itself would apportion that legislative body of the State in the manner it had directed.

The inexplicable feature of that Decree is that the Decree discusses the provisions of Section 9(a), *supra*, terms the "except" clause therein to constitute "an irreconcilable incongruity" which it declares to be *interpreted* as ineffective, and thereby limits Senate membership to 44 without any additions, yet, *in the very paragraph so holding, the decision in Jones* v *Freeman, supra,*[10] *is cited.*

In Cause No. 688, it has been pointed out that this decretal declaration of the law of Oklahoma, actually overruling the decisions of the Oklahoma Supreme Court in relation to the law of the State, is a direct violation of the Rules of Decision Act[11] and, since the Decree itself made this provision of state law a material issue in the

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[10] *supra,* note 7, p. 7.

[11] Act of June 25, 1948, c. 646, 62 Stat. 944, 28 U.S.C. § 1652.

litigation, it further transgressed the doctrine of abstention.[12]

The State Senators, who were intervening defendants in the litigation and the only defendants who had any governmental authority to act in implementation of the mandate of the decree, were thereupon confronted with the dilemma of introducing legislation in compliance with the 3-judge court's declaration of Oklahoma law, and then having the Oklahoma Supreme Court hold such a Senate composition to be constitutionally unauthorized, or of introducing legislation in compliance with the decision in *Jones* v. *Freeman, supra,*[13] and having the 3-judge court reject it as a failure to comply with its mandate.

Therefore, the appellant State Senators, together with others of their colleagues, sought from the Supreme Court of Oklahoma by bill *quia timet* a redetermination of the requirements of the Oklahoma Constitution in relation to their dilemma. Since, however, they were obliged to so proceed, on their own initiative, instead of by direction of the Federal Court as this Court had instructed in similar previous instances,[14] they further asserted the invalidity of Sections 9 and 9(a) of Article 5, of the Oklahoma Constitution,[15] in accordance with the procedure in such instances

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[12] *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176-178; *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 499-501; *Government and Civic Emp. Org. Com. CIO* v. *Windsor*, 353 U.S. 364, 366.

[13] *supra*, note 7, p. 7.

[14] note 12, *supra*.

[15] *supra*, note 4, p. 4.

which this Court had prescribed in *Harrison* v. *N.A.A.C.P.*, *supra*,[16] and like decisions.

The 3-judge court thereupon "protected" its counter-declaration of the law of Oklahoma, its violation of the Rules of Decision Act[17] and its own failure to comply with the doctrine of abstention, by enjoining the prosecution of the proceedings in the State Supreme Court—proceedings which it should have ordered instituted immediately that it had injected into the litigation the issue of construction of Section 9(a), *supra*.

e. SUBSTANTIALITY OF QUESTIONS PRESENTED

Appellants are fully aware that, prior to the amendment and revision of the statute on direct appeals from 3-judge court decisions by the Act of June 25, 1948, c.646,[18] a direct appeal to the Supreme Court whether from a 3-judge court or otherwise, required that the issues on appeal definitely must involve the application of the Constitution of the United States in relation to the State law under consideration.[19] The determining factor for appeals was the *question* directly involved in the appeal.

However, by the revision of 1948, the determining factor was changed to that of the injunctive nature of the order entered, coupled with the *nature* of the "action, suit

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16 note 12, *supra*; see also, decision on subsequent appeal, No. 5 this Term, rendered Jan. 14, 1963.

17 *supra*, note 11, p. 8.

18 *supra*, note 1, p. 4.

19 62 Stat. 926, 28 U.S.C. § 1253.

or proceeding" in which the injunction order was entered.[20] That is, if the action, suit or proceeding be required to be heard and determined by a district court of three judges, any order *in such action, suit or proceeding*, granting or denying, after notice and hearing, an interlocutory or permanent injunction is made appealable direct to this Court

Although appellants have been unable to find where this Court has had direct occasion to comment on this complete change of *rationale* of the appeal statute,[21] the decision in *Railroad Commission of Texas* v. *Pullman Co.*, *supra*, and in *Harrison* v. *N.A.A.C.P.*, *supra*,[22] together with the comment of Mr. JUSTICE DOUGLAS in his dissent to the latter, appear to be more logically consistent with the above construction than with the former provisions of the statute. For, in those decisions, the reversals were based upon the procedural abuse of discretion of the 3-judge courts, not upon the Federal questions decided by them.

It might be added, however, that the injunctive order here appealed effectively involved the unquestionably Federal questions introduced into the State court proceeding pursuant to the instructions of this Court in *Harrison* v. *N.A.A.C.P.*, *supra*,[23] and *resulted* in the indirect decision

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[20] § 238 Judicial Code, as amended by Act of Jan. 28, 1915, c. 22, 36 Stat. 1157, 38 Stat. 220, and by Act of October 22, 1913, c. 32, 38 Stat. 220.

[21] Act of June 25, 1948, c. 646, 62 Stat. 926, 28 U.S.C. § 1253.

[22] *supra*, note 12, p. 9.

[23] *supra*, note 12, p. 9.

of those Federal questions in relation to the state law, whatever its provisions.

It is the position of appellants that the injunctive order here appealed was not in aid or preservation of the jurisdiction of the 3-judge court, as permitted by law,[24] but was a compounding of its former abuse of its discretion, at the least, if not in direct violation of the said law, for the reason that when the 3-judge court, by its Decree of August 3rd had made the construction of state law a material issue, *then* it should have followed the doctrine of abstention and certainly should not have *prevented* State court action to protect its former error.

Actually, this appeal is so directly related to the appeal in Cause No. 688 that, were the procedure provided by the Rules, it would have been docketed as a supplement to that appeal. As is pointed out in the Response to the Motion to Dismiss Cause No. 688, the injunctive order here appealed is highly probative of the nature and intent of the Decree there appealed, and properly should be considered by the Court in determining its jurisdiction therein.

Moreover, the Court is entirely warranted in entertaining the subject-matter of both appeals due to the transcendental public importance of the legislative reapportionment issues involved[25] and their close relation to other

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[24] Act of June 25, 1948, c. 646, 62 Stat. 968, 28 U.S.C. § 2283.

[25] *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 489, and cases cited.

causes involving that comprehensive problem which must be decided at this Term.

Respectfully submitted,

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JIM A. RINEHART,
El Reno, Oklahoma;

LEON S. HIRSH,
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Oklahoma City, Oklahoma,

Attorneys for Appellants.

Of Counsel:
PAUL JOHANNING,

February, 1963.

APPENDIX

APPENDIX I

Jan. 30, 1963
VERA L. HOWARD
Clerk U.S. District Court
By Allen Couch
Deputy
FILED

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HARRY R. Moss, Plaintiff,	)	
vs.	)	
WILLIAM A. BURKHART, State Treasurer, et al., Defendants,	)	No. 9130
M. A. PRICE, et al., Intervenors,	)	
WALT ALLEN, et al., Intervening Defendants.	)	

O-R-D-E-R

This matter comes on for consideration on motion of the plaintiffs to enjoin the intervenors from proceeding further in the Supreme Court of Oklahoma, in an original action Number 40364, entitled Walt Allen et al. v. William A. Burkhart, et al. The parties appeared by counsel and by person as of record.

Upon consideration of the motion, the court is of the opinion that the intervenors should be and are hereby en-

joined and restrained from proceeding further in the Oklahoma Supreme Court until further order of this court.

(Signed) Alfred P. Murrah
Alfred P. Murrah

(Signed) Ross Rizley
Ross Rizley

(Signed) Fred Daugherty
Fred Daugherty

APPENDIX II

FILED
Jan. 30, 1963,
VERA L. HOWARD
Clerk U.S. District Court
By Allen Couch
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HARRY R. Moss, Plaintiff,	)	
vs.	)	
WILLIAM A. BURKHART, State Treasurer, et al., Defendants,	)	No. 9130
M. A. PRICE, et al., Intervenors,	)	
WALT ALLEN, et al., Intervening Defendants.	)	

MEMORANDUM OF DECISION GRANTING RESTRAINING ORDER

By Order entered January 15, 1963, this Court restrained the intervening senators from further prosecuting

in the Oklahoma Supreme Court an original action involving constitutional issues relating to the Oklahoma apportionment laws which are now in process of litigation in this Court and in this suit. Inasmuch as the intervenors have filed notice of appeal from our Order to the Supreme Court of the United States and to the Court of Appeals, and in view of the protracted course of the litigation, it seems appropriate to bring the Order into its proper context.

When this suit was commenced pursuant to Baker v. Carr, the responsible executive state officers who were made defendants all promptly entered their appearance and consented to the jurisdiction of the Court over the subject matter and their person. The Governor, the Secretary of State, the State Treasurer and the State Election Board all answered confessing the truth of the complaint, and agreeing that the complainant and his class were entitled to the relief sought. The Governor, joined by the other defendants, freely confessed that all available state remedies had been exhausted, and that recourse to the federal court under Baker v. Carr was the only remaining course of action. And see statement of the case in Moss v. Burkhart, 207 F. Supp. 885, 889.

At the April 23, 1962 hearing, on Plaintiff's application to enjoin the forthcoming May 1st primary election, the responsible defendants urged us to grant an injunction; the Governor offered to convoke an extraordinary session of the Legislature for the purpose of enacting apportionment laws in compliance with the mandate of the Constitution of the State of Oklahoma and the equal protection clause of the 14th Amendment.

After the hearing, but before final decision, a group of individuals calling themselves "Oklahomans for Local Government" were permitted to intervene. They suggested the absence of necessary parties-defendant and further suggested that in view of the confessions of the defendant-

state officials, the proceedings was not adversary, and that there should be a realignment of the parties. They specifically denied malapportionment of the Legislature under existing laws and offered to show a rational basis for the existing apportionment. They affirmatively alleged that the apportionment in accordance with the mandate of the Oklahoma Constitution would operate to deny them and their class the equal protection of the laws guaranteed by the 14th Amendment. Finally, it was alleged that the power to reapportion was vested exclusively in the State Legislature, and that it should be afforded an opportunity to perform its constitutional function either in a special session or the next general session.

At the conclusion of the hearing, the Court sustained its jurisdiction of the subject matter as a justiciable controversy. The majority of the Court refused to enjoin the forthcoming primary election, but called attention to the manifest disparity in the elected representation of both branches of the Oklahoma Legislature, and suggested that on the face of the disparity, the plaintiff was entitled to relief under the plain mandate of the Oklahoma Constitution and the 14th Amendment to the federal Constitution. The case was set for trial approximately 50 days later on the issue of rationality of the admitted disparity. When the case came on for trial, plaintiff and those aligned with him, offered evidence without objection tending to show that the disparity in the legislative apportionment was invidiously discriminatory; that apportionment on a numerical basis was the starting point to achieve equal protection of the laws with respect to the election of representatives to the Oklahoma Legislature. The Attorney General of the State submitted a formula for reapportionment based primarily upon the requirements of the Oklahoma Constitution, modified to comply with the requirements of the 14th Amendment to the federal Constitution. The first intervenors, though present by counsel and participating, offered no

evidence on the issue of rationality. Based upon the evidence adduced, the trial court found that the apportionment was invidiously discriminatory, and that the underlying election laws were prospectively void. But no final relief was decreed or granted. Instead, the case was passed until September 10, 1962 for determination of appropriate remedies. At the same time the Court suggested three probable remedies: (1) apportionment by the Legislature in special session; (2) the pending initiative petition; and (3) judicial intervention only as a last resort. And, in that connection, we noted that in the event it became necessary to bring about reapportionment by judicial intervention, it would be time enough to hear and consider any factors which might enter into the reapportionment equation. See Moss v. Burkhart, p. 895.

Before the date set for the hearing on September 10, the first intervenors moved to alter, amend or clarify the decree. On the day before the motion came on for hearing, and on July 30, the intervening senators, represented by the same counsel who represented the first intervenors, moved for permission to intervene, alleging that they should have been joined as parties from the beginning, and prayed that they be permitted to intervene to protect themselves and "their own civil and political rights." Intervention was allowed. In their answer, they acknowledged jurisdiction of the Court to determine the applicability of the 14th Amendment to the rights and claims of the plaintiff, but denied the power of the Court to alter or revise the structure of the legislative department of the State in a manner to interfere with the existence, validity or the incumbency of their respective elective offices. They specifically alleged that any apportionment based upon census population, as provided in the Oklahoma Constitution, would be invidiously discriminatory against them and in contravention of their rights under the 14th Amendment. Finally, they pray "that the issues raised by the plaintiffs and the defend-

ants as herein controverted be tried and determined in the regular course, fully protecting the rights and interest of these answering defendants under the federal Constitution and laws. * * *"

At the hearing on the motion to modify the June 19 interlocutory decree, one of the intervening senators, apparently appearing on behalf of all of the intervening senators, testified in response to direct questions from the court and counsel that he would "vote for * * * and support * * * with all my might and vigor * * *" the final adjudication of the constitutional issues in this court.

Pursuant to the hearing on the motion to alter and amend, the Court clarified its interlocutory decree of June 19, to specify that it did not affect the validity of the forthcoming general election; and that the interlocutory decree applied prospectively to elections in 1964 and thereafter. Further hearing in the case was set approximately 5 months later on March 8, 1963. Meanwhile, a new Legislature would have been elected and in session for approximately 60 days. As a guide line for an appropriate remedy for the malapportionment, the Court expressed the positive view that the Legislature should be reapportioned substantially in accordance with the Oklahoma Constitution and in accordance with a plan and formula submitted by the State Attorney General.

The initiative referendum providing in substance for the creation of a constitutional commission to reapportion the Legislature in accordance with the existing provisions of the Oklahoma Constitution was submitted to the people on November 6, and the question arose whether the initiative petition had received the required vote of the people and had become the law of the land. The plaintiffs and the responsible state officials sought to clarify the question in this Court as a necessary incident to the determination of appropriate remedies.

About the same time, the intervenors filed a proceedings, first, in the State District Court and then an original proceedings in the Supreme Court of Oklahoma. The original proceedings was an action in the nature of a bill quia temit "to prevent anticipated mischiefs which could not after their occurrence be adequately redressed." The first cause of action sought a declaration to the effect that the initiative petition did not receive the number of required votes and did not become law. The second and third causes of action alleges substantially the same subject matter set forth in their petition for intervention in this case, and seeks substantially the same affirmative relief. When the plaintiff's motion to declare that the initiative petition had become the law of the State came on for hearing in this case, our attention was called to the pendancy of the original proceedings in the state court. We thereupon deferred consideration of the same in deference to action by the State Supreme Court. That Court did assume jurisdiction of the first cause of action, but reserved its ruling "as to whether jurisdiction of the remaining causes of action pleaded by the applicants will be assumed." The Oklahoma Court has now determined that the initiative petition "failed of adoption for lack of sufficiency of affirmative votes." Allen, et al. v. Burkhart, et al. (Okla.), decided Dec. 22, 1962. That decision is of course binding here. Thereafter the intervenors amended their petition in the Supreme Court of Oklahoma to reassert the same matters and issues originally pleaded here, and on which the Oklahoma Supreme Court had reserved jurisdiction.

As the litigation now stands, the intervenors are in courts of two sovereign jurisdictions, alleging substantially the same subject matter and seeking substantially the same relief. The gloss of the pleadings may be somewhat different, but the subject matter of the lawsuits and the relief sought are essentially the same. The jurisdiction of both courts may be conceded, as indeed it is. The decisive

point of consideration is that early in the course of this litigation, the intervenors invoked this court's jurisdiction and consented to its processes. They now seek to circumvent or frustrate that jurisdiction by provoking unseemly state-federal conflict over the same subject matter. In substance, they would remove a case into which they have intervened to another forum. In this posture, it seems important in sensitive areas of this kind that the Court having first acquired jurisdiction of the subject matter should proceed to a final determination of the tedious questions involved. Any attempted division or dual exercise of the concurrent jurisdiction can lead only to unwarranted confusion, and ought to be avoided. We think that the proper administration of justice and the maintenance of a harmonious state-federal relationship require us to restrain the intervenors from taking their lawsuit elsewhere.

APPENDIX III

DECREE

Endorsed: Filed Aug. 3, 1962.
Vera L. Howard, Clerk,
U. S. District Court
By Cecil A. Qualls, Deputy

The above matter came on for hearing pursuant to assignment on the 31st day of July, 1962, on the Motion to Alter or Amend Decree, filed by the Intervenors M. A. Price, et al., Directors of Oklahomans For Local Government, an unincorporated association, and for a consideration of the various remedies for reapportionment suitable for implementation in view of the previous Interlocutory Decree entered by this Court on June 19, 1962.

The said Motion to Alter or Amend Decree is overruled, except by way of clarification it is the order of the

Court that the scheduled general election, to be held on November 6, 1962, is not affected by the order of this Court entered on June 19, 1962 to the effect that the laws under which the present legislature of Oklahoma is apportioned are "prospectively null and void and inoperative for all future elections." The forthcoming November 6, 1962 election is not a "future election" within the meaning of said Interlocutory Decree, but is an election under way and in being at the time said order was entered, the same having started with the filing period in February, 1962, and having continued through primary and runoff elections with the said general election remaining to be held to complete the election process. See: *Gragg* v. *Dudley* 289 P. 254. Moreover, by reapportionment being necessarily prospective in nature and being accomplished for future effect, said interlocutory decree applies to the elections of 1964 and future elections, including any election that may follow the 1962 election which is now in progress and has been since February, 1962.

With reference to a consideration of the remedies available to effect future reapportionment and the selection of a constitutionally acceptable remedy, the Court is of the opinion and decide that it defer action to the general session of the Oklahoma Legislature to be held in 1963, with a date to be fixed for final action in the matter by such Legislature and with positive guidelines or standards now being furnished said Legislature in the matter of discharging its responsibility to reapportion both houses of said Legislature for the 1964 and ensuing elections.

The following guidelines or standards are established:

1.

The Oklahoma Legislature will be reapportioned on the general principle of substantial numerical equality, to the end that each voter shall have approximately the same power and influence in the election of members of the two

houses, which is in consonance with the intent and spirit of the Oklahoma Constitution and the equal protection clause of the Fourteenth Amendment of the United States Constitution.

2.

The House of Representatives of the Oklahoma Legislature will be reapportioned in accordance with the provisions of the Oklahoma Constitution relating to such House, except the Court finds and declares that the seven member ceiling established in Section 10(d), Article 5, Oklahoma Constitution for populous Counties results in invidious discrimination against the Plaintiff and his class, therefore violates the Fourteenth Amendment of the United States Constitution, and must be disregarded.

3.

The said seven member ceiling being eliminated, Oklahoma and Tulsa Counties are entitled to 19 and 15 legislative seats, respectively, under proper reapportionment, under the 1960 Federal Census.

4.

The Senate of the Oklahoma Legislature will be reapportioned in accordance with the provisions of the Oklahoma Constitution relating thereto. In this connection, however, the Court is brought face to face with an irreconcilable incongruity in Section 9(a) of Article 5, of the Oklahoma Constitution, with respect to the formula for apportioning the Senate. This incongruity is caused by the "except" clause in Section 9(a), which creates a discrepancy between the total number of Districts and the total number of Senators. We resolve this incongruity in favor of equality of representation, which is mentioned three times in Sections 9(a) and 9(b), believing as we do that it is in consonance with the general principle of the Oklahoma Constitution, as construed by the Oklahoma Supreme Court

in *Jones* v. *Freeman*, 146 P.2d 564, and more nearly conforms to the equal protection clause of the Fourteenth Amendment to the United States Constitution. Applying this general principle of equality, the Oklahoma Senate will thus consist of 44 Districts and 44 Senators. Under the 1960 Federal Census, Oklahoma County is entitled to eight Senatorial Districts and Senators; Tulsa County, seven Senatorial Districts and Senators; and, Comanche County, two Senatorial Districts and Senators. Those Counties having multiple Senatorial Districts will be districted within themselves into the requisite number of Districts by legislative act, provided each such District shall contain as near as may be an equal number of inhabitants; shall be contiguous and compact as practicable.

5.

The matter of formin, legislative Districts, either House or Senate, among Counties is left to the discretion of the Legislature, under the pertinent provisions of the Constitution with respect to substantial numerical equality, compactness and contiguity. In this connection, the Memorandum and Suggested Order and Decree, filed in this Court on July 30, 1962, by the Honorable Fred Hansen, First Assistant and Acting Attorney General, is recommended as a most helpful treatise, and contains a Suggested Order And Decree which indicates a legislative apportionment for both houses, which has been studied by the Court, and which is believed to meet the desired standards.

Five months hence, when the Legislature convenes, it must reapportion itself in accordance with the constitutional mandate, or be judicially reapportioned. We have withheld judicial reapportionment on the solemn word of the intervening legislators that once their constitutional duty is unequivocally and unescapably clear, they will discharge it with befitting honor and fidelity..

Jurisdiction is retained in this case and the same is continued until the 8th day of March, 1963, at which time the case will be called, and if proper action has been taken by the Oklahoma State Legislature under the guidance afforded herein, the same will be affirmed and approved and this case dismissed. Failing this accomplishment, this Court will then order and decree reapportionment by judicial order, in conformity with the guidance herein furnished.

Dated this 3rd day of August, 1962.

/s/ Alfred P. Murrah
Alfred P. Murrah, Chief Judge
United States Court of Appeals
Tenth Circuit

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX IV

Endorsed: Filed Aug. 8, 1962
Vera L. Howard, Clerk,
U. S. District Court
By Cecil A. Qualls, Deputy

DISSENTING OPINION OF JUDGE RIZLEY

On June 19, 1962 this Court filed a unanimous opinion in the above styled cause in which it said and I quote:

"The case now comes on for trial on its merits, the parties appearing in person or by counsel. From the stipulations, evidence and other facts of judicial notice, we find there has been only token reapportionment by the State of Oklahoma of its legislative body since 1911. Both branches of the legislature have consistently disregarded the pro-

visions of the State Constitution with respect to reapportionment, with no thought of affording the equal protection of the laws."

We then reviewed all the attempts that had been made to obtain reapportionment in Oklahoma for the past fifty years including the attempt by initiative petition and then said: "On this record, the Court concludes that the existing apportionment of the offices of both houses of the Oklahoma Legislature is *grossly and egregiously* disproportionate, and without rational basis or justification in law or fact. We conclude that the apportionment of the Legislature of Oklahoma, under and by virtue of its apportionment statutes is *invidiously discriminatory* against this Plaintiff and his class of voters, and all such statutes are, therefore, *unconstitutional and void.*" (Italics ours).

We further said in our June opinion: "The Plaintiff and his class are entitled to appropriate equitable relief, which will substantially insure the numerical apportionment of the Oklahoma Legislature, in a manner to accord the Plaintiff and his class the equal protection of the laws, guaranteed by the Fourteenth Amendment."

It should be noted that the Court, after reviewing the history of the Oklahoma Legislature for half a century, was not content with simply using the word "disproportionate," but emphasized that term by using the words "grossly and egregiously disproportionate." Webster's Dictionary defines the word "egregiously" as something that is prominent, eminent, conspicuous for bad quality, flagrant; and the word "invidious" as "tending to excite odium, ill will, or envy; likely to give offense; and unjustly discriminating." Mr. Webster says it is synonymous with "repugnant" and then he defines "repugnant" as "opposed or reciprocally opposed, contradictory, irreconcilable, as a principle repugnant to constitutional law; that offers resistance, hostile, refractory, distasteful, repellent." "Re-

pugnant implies a nature alien to one's ideas, principles, or tastes, and a stirring up of resistance or loathing; repellant, a forbidding or unlovely quality that causes one to back away; abhorrent, a repugnance that stimulates antagonism."

In keeping with our June opinion, we filed with it a decree in which we said and I quote: "The Court is of the opinion that the existing statutes of the State of Oklahoma, relating to apportionment for the nomination and election of the members of both houses of the Oklahoma Legislature are invidiously discriminatory against the Plaintiff and his class; hence, null and void.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Title 14, Secs. 9-77, inclusive, 99 and 100 O.S. (1961), and Article 5, Section 11 of the Oklahoma Constitution, where presently operative, be, and they are hereby declared prospectively null and void, and inoperative for all future elections."

The majority seem to take comfort in the words "prospectively inoperative" and construe future elections not to mean the November election in 1962. They say further that by us refusing in our first opinion to enjoin the primary election, that we condoned the illegal and unconstitutional statutes, and they say that because the primary and general election is in fact all the same election, that we are obliged to recognize it as a legal election, notwithstanding that we have said the statutes under which it is being held are null and void.

In my search of judicial decisions since the beginning, I am unable to find any decision of any court which says that by condoning a void and illegal statute or by condoning a writing, you breathe legality into the statute and give a right to those who operate under it, even though it is wrong.

In an endeavor to overturn the earlier opinion of this Court, entered herein on June 19th, the majority gives two legal reasons unsupported by authority. They say: (1) that the general election to be held in November, 1962 is not a future election; (2) that when we said in June that the statutes under which the legislature is apportioned are unconstitutional and void, they were just void in June and not in August and that we could control the operation of the Constitution.

The only authority cited by the majority in its decree in support of their finding that the general election in November, 1962 is not a future election is *Gragg* v. *Dudley*, 289 Pac. 254. This case itself is not in point since the interpretation therein that the election process includes registration, primary elections, the general election and the announcement of the election returns is pure dicta insofar as it related to the primaries. There a State Senator sought to run for the office of Lt. Governor. The question was raised that this violated Article 5, Section 23 of the Oklahoma Constitution. All that was necessary to that decision was the ruling that the November election was not complete until the votes were counted and the result made known.

Article 3, Section 1 of the Oklahoma Constitution provides:

> "Qualified electors of this State shall be citizens * * * who have resided * * * in the election precinct thirty days next preceding the election to which such elector offers to vote."

Under Oklahoma law, a registration period is provided before the primary election, the run-off election, and still another before the general election. If the theory adopted by the majority is correct, the last two named registrations would violate this constitutional provision.

As a practical matter the Oklahoma Supreme Court in the case of *Stafford* v. *State Election Board*, 218 Pac. (2d) 617, did distinguish the cited case and said at page 620 the following:

> "We agree with the contention of petitioner that the provisions of the Constitution that members of the House of Representatives must be at least 21 years of age at the time of their election means at the date of the general election and not the primary election.
>
> "The Constitution does not prescribe the qualifications of a candidate in a primary election."

In *State* v. *Carter*, 59 Pac. (2d) 948, at 949, the Oklahoma Supreme Court said:

> "At the time of the adoption of the Constitution great consideration was given to the question of popular election of public officials. The Constitution required the Legislature to pass a mandatory primary law. Section 5, Article 3, Const. However, it has been well recognized not only in this State, but by the highest courts of other states, that there is a wide distinction between 'election' and a primary election; the latter being statutory methods provided for the selection of representatives of the various political parties in the 'elections' provided by the Constitution for the selection of the various state, county and other public officers."

We submit that it is perfectly obvious that what the majority meant in June and what they now mean are entirely two different things.

The majority in its haste to recede from our June 19th opinion has glossed over a very important question of law. That is to say, where a court, as we did in the June opinion, declares a statute creating public offices null and void, the statute is null and void ab initio. This princi-

ple of law is set out at length in the landmark case of *Norton* v. *Shelby County*, 118 U.S. 425. The Supreme Court of Tennessee had earlier declared a statute allowing a board of commissioners to subscribe to railroad stock unconstitutional. The case was appealed to the United States Supreme Court. One of the parties argued that if there was not a de jure officer, that the officers were de facto. The other party argued that if the statute was unconstitutional, there was no office existing and there could not be a de facto officer. Mr. Justice Field, in answering the question posed, said:

> "But it is contended that if the act creating the board was void, and the commissioners were not officers de jure, they were nevertheless officers de facto, and that the acts of the board as a de facto court are binding upon the county."

Said Mr. Field:

> "This contention is met by the fact that there can be no officer, either de jure or de facto, if there is no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. * * * Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Our own Oklahoma Supreme Court followed the United States Supreme Court in the case of *State* v. *The Board*

of County Commissioners of Creek County, 188 Okla. 184, 107 P.2d 542, which says and I quote:

> "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. It imposes no duties, confers no rights, bestows no power or authority on any one, affords no protection and justifies no acts performed under it."

As I have heretofore suggested, the majority of the Court seems to take comfort in the words "prospectively null and void for all future elections," but the Oklahoma case above cited knocks this argument into a cocked hat by saying courts do not have the power to make a statute inoperative from the point of adjudication forward. Quoting from an earlier Florida case, our Court said, at page 574:

> "Validity or invalidity relates to the enactment of a statute under existing organic law and not to a subsequent date. The courts have no power to make a statute inoperative only from the date of an adjudicated invalidity, because the courts merely adjudge that a statute conflicts with organic law, and the Constitution then operates to make the statute void from its enactment, the courts having no power to control the operation of the Constitution."

We are bound to give weight and validity to the Oklahoma authorities, and when the Oklahoma Court has said that courts have no power to say when a statute is or is not inoperative, after once declaring the statute void as being unconstitutional, it would certainly be presumptious on our part to attempt to control the operation of the Constitution. Far be it from me to say that in a proper case that there is no question but what there is a place

for the de facto doctrine, but ours is not such. This doctrine is founded upon consideration of policy and necessity for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the titles of persons clothed with authority. For the good order and peace of society, their authority is to be respected until some mode is prescribed by law to determine their rights to serve. Such is not the case here. The offices of the legislature were determined null and void. They no longer exist, and the decree of June 19th contemplated a sure and orderly correction of the situation. The majority has backed away from the strength of the earlier decree and is now taking a position where they sanction that which they condemned. It is an untenable position, and in my opinion it is the unqualified duty of the Court to apportion.

There is positively no evidence in the record to sustain any finding that there is not ample time to have a primary, a run-off, and a general election to elect a constitutional legislature. In fact all of the evidence is to the contrary.

There is also evidence in the records that funds can be made available to hold the elections. This would be legal, right and not postpone the relief to which we say the plaintiff and all of his class are entitled. "Justice delayed is justice denied."

Finally the majority, in order to extricate themselves from the June opinion, state they have withheld judicial reapportionment on the solemn word of the intervening legislators that once their constitutional duty is unequivocally and unescapably clear, they will discharge it with befitting honor and fidelity. I have searched the record and do not find such a promise on the part of any individual legislator. To the contrary, nowhere does the record disclose that any single legislator, much less a majority of

both Houses, have represented that the legislature intends to act in keeping with either the State Constitution or this Court's decree. The majority of the State Senate who intervened at the hearing on the remedy, state in their pleadings that they desire a legislative session "in order that they may *institute constitutional processes to correct the presently existing discriminatory constitutional provisions*"; further, that "any relief, which the Court might decree, based on census population as aforesaid, would be invidiously arbitrary and discriminatory"; and finally, these intervening defendants contend and attempt to show that the provisions of the Constitution of Oklahoma, in respect to legislative representation in this State, have become invidiously discriminatory since the adoption of said provisions; "and that said provisions cannot be met or enforced by any legislation conforming thereto without contravention of Amendment XIV to the Constitution of the United States."

These intervenors even question the power of the judiciary to enforce the Fourteenth Amendment and state that any decree herein would be an unlawful derogation of their powers. This was their pleading.

At the hearing they substantiated their intent by introducing a plethora of unexplained and useless figures and charts which they orally stated substantiated their contention that we should ignore the census and that they can ignore substantial equality in apportioning or in submitting constitutional revisions pertaining to apportionment.

Intervenors produced only two witnesses. The Speaker of the House of Representatives, who expressed a hope that the House could reapportion but refused to hazard an opinion as to the ability of the Senate to pass apportionment provisions, and I might say parenthetically, it is obvious that if there is only hope that the House might

be able to pass such provisions, there can be no hope that the Senate can do so since it is far more malapportioned than the House. The other witness was a State Senator of many years' service, who would make no stronger statement than he was ready to assume his responsibilities to the people of the State. On cross-examination he admitted that he had always been ready to assume such responsibility, although he further admitted that he had voted against apportionment in accordance with the State Constitution during the previous session. He had served in each of the nine sessions since the State Supreme Court in *Jones* v. *Freeman* stated that the question of apportionment went to the "very vitals of democracy," and the Court in the *Jones* case had further solemnly placed its faith in the State Legislature to uphold its constitutional oaths. This witness stated he would not comply with the order of this Court but only act after the law is clearly outlined by the United States Supreme Court in subsequent opinions, which may take the Lord only knows how long to convince this Senator and others like him.

It is, therefore, respectfully submitted that my brothers' statement is wholly without basis in the record, and the facts of history for almost half a century disclose that it is wholly without justification and can only lead to a hopelessly chaotic legislative session that can produce nothing more than the submission of a constitutional amendment which, if adopted, would violate the Fourteenth Amendment. Even the Supreme Court of the State of Oklahoma in its most recent opinion, *Brown* v. *State Election Board, et al.*, stated:

> "An individual legislator may be willing to vote himself out of an office, but it would be difficult to find one who is willing to vote his constituents out of a legislator contrary to their wishes."

It is respectfully submitted that we should have deferred to the interpretation of the abilities of the legislators to reapportion themselves as expressed by the State Supreme Court and the Chief Executive of the State, who are in a far better position to judge the situation than are we. It is significant that the legislators solemn word is the only reason given by the majority for staying the judicial hand, and this reason is patently unsound.

We have found a legal wrong to exist. The majority would refer this wronged plaintiff and those of his class to a political remedy. In fact, the political remedy suggested is the very one which has caused the wrong. Therefore, I see no justification for delaying the judicial hand and to the contrary I foresee only chaos as a result of this delay and further complications as a result thereof. This Court has been fortunate in having a Chief Executive, a State Treasurer, an acting Attorney General and a State Election Board that have offered full cooperation. Who can dare say that their successors, who will be in office on March 8, 1963, will be as cooperative, much less cooperative at all?

While I might bleed with the majority for the downtrodden intervenors, who pleaded with the Court for a chance to do it themselves, I can only interpret what they may have in their minds by their past acts in challenging not only the Supreme Court of Oklahoma, but also more than 200,000 residents of Oklahoma who signed an Initiative Petition, the State Election Board, and everyone else who has attempted to get them to discharge their constitutional duty with honor and fidelity.

I respectfully dissent.

/s/ Ross Rizley
Ross Rizley, Judge
United States District Court
For the Western District of
Oklahoma.

APPENDIX V

Article V, Sections 9, 9a and 9b, Constitution of Oklahoma (Volume 1, pp. 64-65, Oklahoma Statutes 1961).

§ 9. Membership and term of office

The Senate, except as hereinafter provided, shall consist of not more than forty-four members, whose term of office shall be four years: Provided, That one senator elected at the first election from each even numbered district shall hold office until the fifteenth day succeeding the regular state election Nineteen Hundred and Eight, and one elected from each odd numbered district at said first election shall hold office until the fifteenth day succeeding the day of the regular state election in Nineteen Hundred and Ten: And Provided further, That in districts electing two senators, the two elected at the first election shall cast lots in such manner as the Legislature may prescribe to determine which shall hold the long and which the short term.

§ 9(a). Senatorial districts—Additional senators

At the time each senatorial apportionment is made after the year Nineteen Hundred and Ten the State shall be divided into forty-four districts to be called senatorial districts, each of which shall elect one senator; and the Senate shall always be composed of forty-four senators, except that in event any county shall be entitled to three or more senators at the time of any apportionment such additional senator or senators shall be given such county in addition to the forty-four senators and the whole number to that extent. Said districts shall be numbered from One to Forty-four inclusive, and each of said districts shall contain as near as may be an equal number of inhabitants, such population to be ascertained by the next preceding Federal census, or in such manner as the Legislature may

direct, and shall be in as compact form as practicable and shall remain unaltered until the next decennial period, and shall at all times consist of contiguous territory.

§ 9(b). Division of counties, towns and wards—Equality of population

No county shall ever be divided in the formation of a Senatorial district except to make two or more senatorial districts wholly in such county. No town, and no ward in a city, when constituting only one voting precinct, shall be divided in the formation of a senatorial district, nor shall any senatorial district contain a greater excess in population over an adjoining district in the same county than the population of a town, or ward in a city, constituting only one voting precinct therein, adjoining such district. Towns, and wards in cities, constituting only one voting precinct, which may, from their location, be included in either of two senatorial districts, shall be so placed as to make such districts most nearly equal in number of inhabitants.

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